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No. 995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

WILLIAM H. WILSON and ADRIANA WILSON,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on January 9, 1963.

Opinions Below

The memorandum opinion of the Tax Court on motion to dismiss (P10a) is unreported. The opinion of the Circuit Court of Appeals (p. 13, *supra*) is unreported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 9, 1963 (p. 14, *supra*). There was no request for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Does a taxpayer have a right to a hearing in the Tax Court of the United States on an income tax deficiency alleged by the Commissioner of Internal Revenue where a petition for redetermination is filed by the taxpayer within 90 days of the first actual notice of such alleged deficiency?

2. Is a taxpayer's right to such hearing lost by reason of the fact that the Commissioner attempted to issue a statutory notice of deficiency, but such notice was not delivered to the taxpayer through no fault of taxpayer but such notice was returned to the Commissioner, who thereafter did nothing to give actual notice to the taxpayer until after expiration of the 90 day period from the date of issuance?

3. Does the mere mailing by the Commissioner of a notice of deficiency to a taxpayer who has kept the Commissioner advised of his last known address, start the tolling of the 90 day period for filing of a petition for redetermination in the Tax Court, if such notice is not delivered to the addressee but is returned to the Commissioner?

4. Is the constitutional right of a private litigant to notice and an opportunity to be heard diminished merely because that litigant's adversary is the United States of America and the subject of the litigation is taxes sought to be assessed against such litigant?

Statutory and Constitutional Provisions Involved

The following provisions of the Constitution and statutes of the United States, which are applicable hereto, are set forth verbatim:

1. Amendment Five, Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, *nor be depriced of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

2. 26 U.S.C., (1958 ed.) 6212 (a) and (b) provides in part as follows:

> (a) In General—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail.
>
> (b) Address For Notice of Deficiency—
>
> (1) Income and Gift Taxes—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of deficiency in respect of a tax imposed by chapter 1 or 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of such chapter and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.
>
> (2) Joint Income Tax Returns—In the case of joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice

except that if the Secretary or his delegate has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by registered mail to each spouse at his last known address.

3. 26 U.S.C. (1958 ed.) Section 6213 (a) provides as follows:

(a) Time for Filing Petition and Restriction on Assessment—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

4. 26 U.S.C. (1952 ed.), Section 272, relating to the sending of the notice of deficiency by the Commissioner to the Tax Court, and Section 272K relating to the address of the notice of deficiency, are applicable for the tax years

1950 through 1953. Insofar as this case is concerned, those sections are substantially the same as Sections 6212 and 6213 and, consequently are not set forth herein.

Statement of the Case

The Commissioner allegedly issued a notice of deficiency under date of January 17, 1961 (P3a). This letter alleged a deficiency of taxes and penalties amounting to $89,669.20 which, with interest, would exceed the sum of $125,000.00.

This notice of deficiency was mailed to the petitioners at their residence, 201 Bell Avenue, Hasbrouck Heights, and to an office address at 345 Boulevard, Hasbrouck Heights, New Jersey. It is uncontroverted that neither of these letters was ever delivered to the petitioners and that both letters were returned to the Commissioner undelivered (P8a).

After the undelivered letters were returned to the Commissioner he took no action whatsoever for more than ninety days (P8a). Commissioner made no attempt to discover why the letters had not been delivered, nor did he attempt in any way to give any notice to the petitioners. Throughout that period, petitioners still lived and worked at the said addresses which fact was known to the Commissioner (P8a).

The Commissioner's next attempt to communicate with the petitioners did not occur until after the lapse of ninety days from the aforementioned date of January 17, 1961, when on or about May 24, 1961, the Commissioner mailed notice of assessments to them (P8a). These were sent by regular mail and delivered promptly to the petitioners. One of the petitioners, William Wilson, immediately telephoned the District Director's Office and on May 26, 1961, wrote to the District Director's Office requesting an explanation for the assessment.

Petitioners retained counsel and an attempt was made to prepare a petition for redetermination. However, it was first necessary to obtain the alleged notice of deficiency. Petitioners did not receive such a notice of deficiency until July 25, 1961 (P8a).

Petitioners prepared and filed a petition in the Tax Court, which was mailed and postmarked August 4, 1961. It was received August 7, 1961 (P3a). The petition in this case was filed within ten days from the date that the petitioners first received a copy of the Commissioner's determination, within ninety days of the date petitioners first received notice of the alleged assessment, which had been given on May 24, 1961.

No reason has ever been disclosed for the non-delivery of the alleged notices of January 17, 1961. It should be noted, however, that a snowfall of more than twenty inches occurred in the northern New Jersey area on the days immediately following January 17, 1961. This snowfall, which was the State's heaviest in more than a decade, seriously disrupted mail service and communication. It is quite likely that this is the reason for the non-delivery of the Commissioner's letter to the petitioners (P8a).

The Commissioner moved before the United States Tax Court of Appeals to dismiss the petition for lack of jurisdiction. In answer to the motion, petitioners filed an objection (P2a).

On November 22, 1961, the matter was argued before Judge ARUNDELL of the Tax Court (P2a). He ruled from the bench that the motion to dismiss was granted. A written order pursuant to the Court's ruling was entered on January 2, 1962.

An appeal was thereupon taken to the United States Circuit Court of Appeals which affirmed the decision of the Tax Court of the United States.

Throughout these proceedings petitioners have acted with reasonable dispatch and as quickly as they could under the circumstances.

The full amount of the alleged tax deficiency, interest and penalties, which exceeds $125,000.00, is still due and owing and petitioners have not been able to pay the same.

Petitioners believe that no tax is due and owing and that upon a review of the Commissioner's determination, sufficient facts and documentation will be produced to establish the error of the Commissioner in finding any deficiency.

Manner in which Federal Question Raised

The Federal questions were raised (1) by respondent's motion to dismiss petitioner's petition for determination of deficiency, and (2) by petitioner's objection to such motion and briefs, affidavits and oral argument of petitioner in support of such objection in the Tax Court.

Reasons for Granting the Writ

1. The decision of the Court below in the instant case is in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in *Tenzer* v. *Commissioner*, 285 F. 2d 956 and *Rosewood, Inc.* v. *Commissioner*, 275 F. 2d 786 and *Eppler* v. *Commissioner*, 188 F. 2d 195 and *Boren* v. *Riddell*, 241 F. 2d 670 and conflicts in principle with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Commissioner* v. *Stewart*, 186 F. 2d 239.

All of the cited decisions of the Ninth Circuit and the Sixth Circuit take the position that the purpose of the deficiency notice provided for under Section 6212 is to give the taxpayer actual notice that the Commissioner means to assess a deficiency tax against him and to give him an opportunity to have such determination reviewed by the Tax

Court. Thus, in the *Tenzer*, *Roeswood Hotel* and *Eppler* cases it was held that the 90 day period within which a petition for redetermination could be filed with the Tax Court, commenced to run from the date of actual notice to the taxpayer and not from the date of mailing by the Commissioner. In each of those cases, the petition for redetermination was filed with the Tax Court more than 90 days after the mailing of the notice of the deficiency by the Commissioner by certified mail. Nevertheless, the courts held that the petition was timely filed and that the taxpayer had the right to a hearing on the merits in the Tax Court.

In *Dolezilek* v. *Commissioner*, 212 F. 2d 458, the Court of Appeals for the District of Columbia left undecided the precise question raised in the instant case. However, in a powerful dissenting opinion one Judge commented at page 462:

> "One cannot be expected to petition for review of an assessment of which he knows nothing. The purpose of notice is to inform. A notice sent out but not received is no information to the addressee, and ought not to start the running of limitation."
>
> "One can conceive, for example, of a situation wherein a trainload of mail would be destroyed by fire. Does such an Act of God completely deprive a taxpayer of a right which statute has granted to all other taxpayers?"

Accordingly, we submit that the issuance of a notice of deficiency without receipt of that notice by a taxpayer who has kept the Commissioner properly advised as to his address, is no notice at all within the meaning of the statute. Such a notice is a nullity for the purposes of commencing the tolling of the 90 day period within which taxpayer may file his petition for redetermination.

2. The question presented is of importance in the administration of the Federal Tax laws. It involves the basic question of whether the taxpayer, who fails to receive actual notice of deficiency without any fault on his part, can be deprived of an opportunity for a hearing on the merits before payment of the additional amounts of the taxes alleged to be due from him. In the cases of those taxpayers who are financially unable to pay the deficiency alleged against them and sue for refund, the deprivation of a hearing in the Tax Court is, in effect, a total deprivation of the constitutional right to an opportunity to be heard.

That the matter is of concern to the tax bar and tax litigants is attested to by the fact that the question has been raised in one form or another in numerous tax court, district court and circuit court proceedings. In fact, the Commissioner himself has indicated confusion and inconsistency as to his own construction of Section 6212. As the Court pointed out in *Tenzer* v. *Commissioner*, *supra*:

> "In approaching this case, it should be pointed out that in its brief in *Boren* v. *Riddell*, *the Commissioner plainly took the position that actual notice was necessary.* Now he contends that the mailing to Tenzer was enough without actual delivery, impliedly, we think, repudiating his argument in *Boren*." (Italics our own.)

Settlement of the question by this court is plainly in the public interest, since it is likely to be presented in almost every case in which a taxpayer does not receive actual notice without any fault on his part.

3. The decision of the Court below is believed to be erroneous and the conflicting decisions of the Circuit Court of Appeals for the Ninth Circuit in *Rosewood Hotel, Inc* v. *Commissioner*, *Tenzer* v. *Commissioner*, *Eppler* v. *Commissioner*, and *Boren* v. *Riddell*, *supra*, and the decision of the

Circuit Court of Appeals for the Sixth Circuit in *Stewart* v. *Commissioner*, *supra*, are correct. Moreover, the decisions below conflict in principle with applicable decisions of this Court. It is generally agreed that this Court has held that a fundamental requirement of due process of law under the Fifth Amendment requires that the party affected by a determination be given notice and an opportunity to be heard as a matter of right, and not of grace. *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Wuchter* v. *Pizzutti*, 276 U. S. 13, 48 S. Ct. 259 (1928). In construing a statute, the Court should indulge in the presumption of the constitutionality of the statute and should at all times construe it in such a manner as to sustain its constitutionality. *O'Gorman and Young* v. *Hartford Fire Insurance Co.*, 228 U. S. 251, 257, 51 S. Ct. 130, 75 L. Ed. 324, 72 A. L. R. 1163 (1931). However, the view taken by the Court below would deprive a taxpayer of an opportunity to be heard in the Tax Court, without any fault or negligence on his part. Such a view, we submit, is diametrically opposed to our traditional standards of fairness, and raises substantial questions of lack of due process of law.

This Court has consistently preserved individual rights from encroachments by the government. The individual's right to notice and a hearing in civil litigation is no less deserving of protection merely because the individual's adversary is the Commissioner of Internal Revenue and the subject of the litigation is liability for federal income taxes.

4. The petitioners in this case filed their petition with the Tax Court by mailing it within ten days after actual receipt of the notice of deficiency. They clearly acted with reasonable dispatch and their action was sufficient to grant jurisdiction to the Tax Court under the applicable statutory provisions.

5. Section 6212 (b) provides that the notice is sufficient if mailed to a taxpayer at his last known address "even if the taxpayer is deceased, or is under a legal disability or, in the case of a corporation, has terminated its existence."

It thus provides a method by which the Commissioner may furnish a notice of deficiency, without actual notice, to those taxpayers who have failed to advise the Commissioner of any change in address or status. By the same token, this subsection implies that the opposite is also true, namely that a taxpayer who has advised the Commissioner as to any change of address or remains at the address set forth in the return, is entitled to actual notice. If this were not the meaning to be attached to the general provisions of Sections 6212 (a), then there would be no purpose or necessity for making special provision under 6212 (b) for those taxpayers who had not advised the Commissioner of their last known address. It is certainly unlikely that Congress intended to deprive a taxpayer of a right to a hearing in the Tax Court, simply by reason of the unfortuitous circumstance that a letter was not delivered to him at his proper address.

6. Nor can one say that the taxpayer has not lost his right to a hearing, simply because of the alternative method available, namely to pay the tax and sue for refund. The constitutional right to a hearing must be based on actual not theoretical rights. If, as is true in this case, as in many others, the taxpayer has a meritorious defense but is without funds to pay the tax assessed by the Commissioner, then of course he cannot pursue the alternative remedy. The only real opportunity he has to be heard is to be granted a hearing in the Tax Court, prior to payment of tax.

It is manifest, we submit, that it was the congressional intent to grant this remedy to all taxpayers who advise the Commissioner of their last known address.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BENEDICT KRIEGER,
Attorney for Petitioner.

HERBERT C. KLEIN,
Of Counsel.

APPENDIX A

Opinion of the United States Court of Appeals

(Filed—January 9, 1963)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,991

WILLIAM H. WILSON and ADRIANA J. WILSON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEAL FROM THE TAX COURT OF THE UNITED STATES

Argued December 3, 1962

Before BIGGS, *Chief Judge* and STALEY, *Circuit Judge*, and LEAHY, *District Judge*

PER CURIAM.

We have examined the opinion of the Tax Court and can perceive no error in either the statement of operative facts or in the application of the law thereto. Consequently the decision will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,991

WILLIAM H. WILSON and ADRIANA J. WILSON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

Present: BIGGS, *Chief Judge*, and STALEY, *Circuit Judge*, and LEAHY, *District Judge*.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

January 9, 1963